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No. 584

In the Supreme Court of the United States

OCTOBER TERM, 1960

YALE TRANSPORT CORP., ET AL., APPELLANTS

v.

UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on June 10, 1960, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought to set aside an order of the Interstate Commerce Commission. The Commission's order had granted the application of United Parcel Service, Inc., ("UPS") for a certificate of public convenience and necessity, pursuant to Section 207(a)

of the Interstate Commerce Act (49 U.S.C. 307(a)), authorizing common carriage of small packages by motor vehicle over irregular routes emanating from New York City and Boston (J.S. 4). Noting that UPS is one of several operating companies, under the common control of United Parcel Service of America, Inc. ("UPSA"), a non-carrier Delaware corporation, which have long held interstate contract carrier permits, the Commission, after full administrative proceedings, found that the operation proposed by UPS, like similar service already provided by it in its intrastate operations[1] "is designed for the handling of large volumes of small packages in a faster, more efficient and more economical service than provided by United States parcel post service, but at rates much the same as for parcel post service" (79 M.C.C. 629, 634). The Commission stated further that the proposed service "differs considerably from operations of existing carriers" (*id.* at 652) and of parcel post because it will be characterized by daily pickups, next-day delivery, signed receipts, automatic insurance and automatic return of undelivered packages (*id.* at 649).

Appellants appeared throughout the Commission proceeding in opposition to a grant of authority. They did not contend, however, at any stage of the hearings, that the Commission could not act because UPSA was not a party to the application, or because

[1] The operations being conducted by UPS under the certificate granted in this case are like those authorized in 1957 in a case involving a UPSA subsidiary in the Chicago area. See *Railway Express Agency* v. *United States*, 153 F. Supp. 738 (S.D. N.Y.), affirmed, 355 U.S. 270.

UPSA was illegally in control of other carrier subsidiaries. On August 25, 1959, nearly three years after the application was filed by UPS, and while petitions for reconsideration of the Division order were pending, the appellants filed a complaint with the Commission, pursuant to Section 5(7) of the Act (49 U.S.C. 5(7)), alleging the existence of unlawful control relationships in the UPS family in violation of Section 5(2) of the Act. At the same time, appellants moved to stay the application proceeding pending determination of their complaint. On February 4, 1960, the full Commission denied petitions for reconsideration in the application proceeding and dismissed the motion to stay. On March 2, 1960, the Commission, Division 4, dismissed appellants' complaint,[2] and on March 9, 1960, the certificate was issued, effective immediately.

On March 14, 1960, the present action was instituted to set aside the Commission's order of February 4, 1960. The district court unanimously sustained the Commission's findings and order.[3]

ARGUMENT

1. Appellants state that the "principal questions" raised by their appeal relate to control of UPS. In

[2] On September 9, 1960, a petition for reconsideration of the order dismissing the control complaint was denied (J.S. 51–52). Contrary to any implication in appellants' brief (p. 7, n. 1), the August 25, 1959 complaint, the Commission's order of February 4, 1960, dismissing the motion for a stay, and the Division 4 order of March 2, 1960, dismissing the complaint, were in the record below, which has been certified to this Court.

[3] The court's opinion and the relevant statutory provisions are appended to the jurisdictional statement.

our view, there is no real or substantial issue on this subject.

A. Appellants argue that the Commission should not have approved the grant of added operating authority to UPS until it determined, in the separate proceeding later instituted by appellants under Section 5, whether it should approve the "new control relationship" between UPSA and UPS.

The short answer is that Section 5 has no direct application to the relationship between UPSA and UPS and that no Section 5 approval was required.[4] UPS was a carrier prior to 1935, the effective date of the Motor Carrier Act, and it was controlled by UPSA prior to that date. Continuance of the existing relationship did not, as appellants concede (J.S. 5), require Commission approval and, contrary to appellants' suggestion, the grant of additional operating authority (authority to perform common, as well as contract, carrier service) to an existing subsidiary does not sustain the conclusion that the parent is acquiring a new carrier subsidiary.[5] As Circuit Judge Friendly stated below (J.S. 39):

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[4] Section 5(2) requires Commission approval before any carrier or parent of a carrier acquires control of a new carrier. See *United States* v. *Marshall Transport*, 322 U.S. 31.

[5] The addition of common carrier authority to the existing contract carrier authority of UPS did raise a "dual operations" question within the meaning of Section 210 of the Interstate Commerce Act, 49 U.S.C. 310. But this section expressly authorizes such dual operations where the Commission, "for good cause shown," finds they are consistent with the public interest and the National Transportation Policy. The Commission so found. Also, it imposed conditions precluding UPS from providing common carrier service to or from persons utilizing its

> * * * Protestants do not seriously contend that new approval is needed when the expansion is by adding areas or commodities; we see no basis for a different rule when the expansion comes by adding contract or common carrier authority to a carrier that previously held only the other. This conclusion follows as a matter not only of good sense but of language and practice as well. Section 5(2) relates to acquisition of control of a "carrier," § 5(13) defines carrier so far as here relevant as "a motor carrier subject to Part II of this Title", and § 203(16) says that "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle." In numerous cases the Commission has approved dual operation by a motor carrier controlled by a person who would be required by § 5(2) to obtain approval of a new acquisition of control of a motor carrier, * * *.

It is unnecessary to argue that the economic policies underlying Section 5 cannot be relevant in the case of an existing subsidiary seeking additional operating authority. We assume that they may be relevant, in a particular case, in determining whether it is in the public interest to permit the controlled carrier to expand or to alter its operations. However, during the entire course of the protracted application proceedings, appellants never attempted to show that grant of the application would not be in the public interest for reasons stemming from the fact that the applicant was a member of the United family. In-

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contract carrier service, thus avoiding the possibility of discrimination or rebating.

stead, appellants, some three years after the application proceeding was instituted, filed a separate proceeding in which they complained, *inter alia*, that there was a formal violation of Section 5 insofar as it was proposed to give added authority to UPS.[6] As observed above, this charge is without foundation; Section 5, as such, is inapplicable to the control of UPS by UPSA.

B. Appellants also charged in their Section 5 complaint that there had been a failure to obtain requisite Commission approval in two other "control" situations: (1) an instance in which a Pennsylvania subsidiary of UPSA became a carrier for the first time, and (2) an instance in which an Oregon subsidiary of UPSA purchased the operating rights of an existing carrier. These discrete matters, which do not in any way involve the transportation here in question, would, we assume, have relationship to the instant case if it might be said that UPSA was thereby shown to be a wilful law violator and that UPS's qualifications for the grant of authority in New York were thereby tainted. It is plain, however, that the failure of UPSA to join in the applications filed by its subsidiaries in the Oregon and Pennsylvania matters was entirely consistent with the Commission's practice at that time and the view of the law which then prevailed.[7] But see the sub-

[6] To date, appellants have not sought review of the adverse decision of the Commission in the Section 5 proceeding.

[7] It should be noted that the Commission authorizations to the UPSA subsidiaries in these cases was made with express recognition of the fact that they were controlled by UPSA.

[footnote continued]

sequent decisions in *United States* v. *Marshall Transport*, 322 U.S. 31; *Hannon-Control-Hannon Motor Lines, Inc.*, 39 M.C.C. 620; cf. *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (C.A. 2). "It would be absurd," the court below stated (J.S. 38), "to hold that innocent failure to anticipate the course of administrative or judicial interpretation of the section [Section 5] necessarily worked a temporary outlawry, at the cost not only of the offender but of the public."

2. Appellants also urge that the Commission's "public convenience and necessity" findings were improperly "based upon the alleged desire of shippers for lower rates and upon the conjecture that United could operate profitably at its proposed low level of rates" (J.S. 17–18), and that the Commission "incorrectly found that no one protestant carrier could provide all the service proposed by United" (J.S. 19). A second review of questions of this kind is not required. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401. In all events, the Commission's findings are fully supported by the record.

Thus, appellants have confused the interest of shippers in lower rates with an assumption that this factor alone was responsible for their endorsement

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See *United Parcel Service of Pennsylvania, Inc., Contract Carrier Application*, 10 M.C.C. 83; *United Parcel Service of Portland—Purchase—A. J. Wiese*, 37 M.C.C. 473, 474; cf. *Brewick & Co.* v. *United States*, 134 F. Supp. 132, 145 (S.D.N.Y.) ("[T]he I.C.C. could not have made a finding of control without approving control * * *").

of the application and for the Commission's subsequent approval. The facts are to the contrary; the Commission's decision makes clear that the shippers' concern for cost considerations was merged with their need for "completely modernized transportation" offered at "a minimum cost" (79 M.C.C. at 652–653). As the three-judge court pointed out (J.S. 32), this interest in the service aspects of the UPS proposal is not negatived by testimony of some of the shippers that the UPS service would lose its attractiveness if its rates were substantially higher than parcel post.

Nor is it true that "there was not an iota of evidence that [UPS] could operate at the level of rates proposed" (J.S. 18). As the court below stated (J.S. 32–33), the general testimony by UPS as to the profitable nature of a number of its common carrier operations and as to its experience in the transportation of small packages was supplemented by specific testimony that in 1956 the UPS intrastate operation in New York, utilizing rates similar to those proposed, produced a profit of $76,066 on operating revenues of $2,016,680—a ratio approximating that applicable to its total business in that year.

Finally, the court was clearly correct in upholding the Commission's findings that UPS would provide an overall service significantly better than that otherwise available. As the court observed (J.S. 31), the record showed that, although some of the existing motor carriers "have duplicated some particular feature of applicant's proposed service, none offered one so flexible and complete."

3. Appellants' final contention is that the Commission's order of February 4, 1960, denying their petitions for reconsideration, was improperly made effective within a lesser period than the 30-day minimum specified in Section 221(b) of the Act, because it was not served upon appellants until February 25, 1960, and the certificate was issued, effective immediately, on March 9, 1960. The district court, however, was unwilling to assume that the section applied not only to an order granting a certificate, but also to a subsequent order denying reconsideration.

In all events, the point, as it arises here, is of no more than academic interest. As the district court noted (J.S. 43):

> [Appellants] had two weeks between service of the Commission's order denying reconsideration and the issuance of the certificate, in which to initiate this action. In fact the complaint was filed on March 14, only five days after the certificate was issued. Neither Judge Palmieri in refusing a temporary restraining order nor we in denying an injunction have relied in any way on UPS' beginning to operate under a certificate which UPS knew was subject to challenge.

Since appellants' right to obtain full judicial review of the Commission's order was nowise impaired, there is no basis for a claim of prejudicial error. See Administrative Procedure Act, Section 10(e), 5 U.S.C. 1009(e).

CONCLUSION

The appeal presents no substantial question warranting further review, and the judgment of the district court should be affirmed.

Respectfully submitted.

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